

Trusts FE.

To have a valid trust the settlor must deliver res to the trustee for the benefit of beneficiaries with the intent to create a trust. The trust must be for a lawful purpose and must usually be in writing. The settlor must have legal capacity to transfer the property.

A trust is valid when the trust is solely of personal property, and all other requirements are met and the trustee is a third party.

To have a trust, there must be property in trust. The trustee must have legal title to the property. An expectation interest is not property, but a future interest in presently owned property. A promise to contribute property to the trust supported by consideration gives rise to a property interest in the trust.

The requirements of a trustee are: (1) Trustee must have legal capacity to deal with the property; (2) Capacity to contract and execute deeds; (3) An unincorporated association cannot be a trustee; (4) Only banks and trust companies can serve as corporate trustees; (5) No trust fails for lack of a trustee, as the court will appoint one if necessary.

A trustee may resign upon court approval with a showing that he can not longer appropriately serve as trustee. he must provide an accounting.

Any illegal purpose is invalid. Trusts that call for the destruction of property are invalid. Trusts that have unlawful conditions against public policy are invalid. For example a trust conditioned on divorce or total restraint on marriage. Partial restraints of marriage however, are valid.

All trusts are revocable and amendable by the settlor unless expressly made irrevocable and unamenable. Any amendment or revocation must be in writing. Guardians of a settlor does not have the ability to revoke a trust. Only a court can revoke upon a finding that revocation is in the ward's best interest.

A durable power of attorney is a signed, notarized document that authorizes another person to act on behalf of the principal. The agent's authority will not be affected by the person's incapacity if it expressly states such. The principal can grant a springing power of attorney that only becomes effective upon

incapacity. Appointment of a guardian of the estate terminates a power of attorney.

A charitable trust must satisfy the other formalities of a trust, and be established for a charitable purpose. A charitable trust is not subject to the Rules Against Perpetuities. Thus it may be perpetual. To be used for charitable purposes or to support the performing arts is valid. To be a charitable purpose, the trust must confer a substantial amount of social, religious, scientific, artistic, medical research, etc value. It cannot benefit an individual or a small group of individuals. If the charitable purposes can no longer be carried out, a court can reform it to carry out the settlor's general intent as near as possible per the Cy Pres doctrine.

Any specifically named charitable beneficiary and the attorney general can enforce a charitable trust. The attorney general is a proper party to any proceeding regarding the trust. If the named beneficiary ceases to exist, the trustee can pick a new beneficiary without going to court, but must notify the attorney general.

An honorary trust is really a gift where the beneficiaries are not people. The gift will be upheld if the trustee decides to perform. If the gift fails there is a resulting trust in favor of the residuary beneficiary. Furthermore RAP applies to this, and the trust should be limited to run 21 years.

A resulting trust is a term that the courts apply to a trust that has failed for some reason. A purchase money resulting trust occurs where A pays the purchase price of property and has the title taken in B's name, not intending a gift. If A and B are related the presumption is that it is a gift, if they are not related then the presumption is purchase money resulting trust.

A constructive trust is not a trust. It is an equitable remedy whose object is to disgorge unjust enrichment. The two elements are: (1) wrongful conduct; and (2) unjust enrichment.

A spendthrift trust protects a trust's beneficiaries from creditors by prohibiting voluntary assignment or involuntary transfer of the beneficiary's interest. They are given full effect in Texas with the exception of contracts for necessities, child support obligations, interests retained by the settlor, and federal tax liens. To be a spendthrift trust, the instrument must expressly provide such.

Creditors can reach any interest in a revocable trust. In an irrevocable trust, only the grantor's income interest can be reached. The creditor cannot reach the principal unless it was a fraudulent transfer.

As to who can compel a trustee with sole discretion to make distribution: (1) The settlor cannot compel a distribution; (2) Creditors can compel the trustee to distribute the maximum amount that the trustee has the discretion to distribute; (3) Beneficiaries can challenge the trustee's discretion.

The courts who have jurisdiction over a trust dispute and where venue is proper are: (1) District courts and statutory probate courts have concurrent jurisdiction over all proceedings regarding inter vivos trusts, but probate courts have exclusive jurisdiction over testamentary trusts; (2) Venue is going to be the residence of the trustee, or if more than one trustee, then the situs of the trust.

Beneficiaries are entitled to an accounting not sooner than 12 months after the trust is created and then every 12 months subsequent.

The trustee's powers are found in the Texas code, except as provided by the settlor, which gives broad fiduciary powers to the trustee. Specifically, the trust code expressly authorizes a trustee to do whatever the question involves. A trustee can do almost anything a fee simple owner could do.

The limitations on a trustee are as follows: (1) A trustee cannot borrow trust funds; (2) buy or sell trust assets to itself; (3) Loan funds to the trust; (4) Profit from serving as trustee except for compensation; or (5) Breach fiduciary duties. Note that this includes: (a) buying stock in a company where the trustee is an executive, even if the stock performs well; (b) however, where there is no loss, courts usually apply the principal of no harm, no foul.

When a fiduciary duty is breached, in addition to bringing an action to remove the trustee, the beneficiary has the option to ratify the transaction or sue for the resulting loss in a surcharge suit. If the case involves self-dealing, then no further inquiry is necessary, as the rule provides that the only issue will be a determination of damages.

A cause of action accrues against the trustee when the suit is

brought within four years of the trustee repudiating the trust, where the trustee dies, or resigns, or gives an accounting that makes a full disclosure of the facts on which the action is based.

When there are multiple trustees the majority rules with multiple trustees. however, a co-trustee has a duty to prevent a breach by the co-trustees. The trustee should not participate in the transaction and express dissent in writing.

Trustee investment performance is measured under the Uniform Prudent Investor Act. Thus, a trustee's prudence is measured at the time the investment was made. The Uniform Prudent Investor Act is based on modern portfolio theory, and looks to the total return. A trustee must establish and maintain a custom investment strategy that will effectuate the settlor's intent. Furthermore a trustee can exercise adjustment power and allocate capital gains to income.

When it comes to a trustee allocating between principal and income in unusual assets look for the following: (1) for an oil-gas lease, all delay rental is income; bonus and production payments attribute 27.5% to principal to cover depletion and the rest is income; (2) Pensions and IRA's are treated as income until they exceed 4% of the plan's value at the beginning of the period; (3) Other liquidating assets allocate either 5 or 10% to income and the rest to principal; (4) Commissions and expenses are allocated one-half against income, and one-half against principal.

A beneficiary can bring an action against a third party who injured the trust when: (1) either the trustee is unable or unwilling to bring an action; or, (2) When the trustee participated with the party in committing a breach of trust.

A court can terminate a trust prior to the time fixed for its termination, upon petition from the trustee or a beneficiary; the court may terminate the trust, or may modify it if the court finds that the provisions of the trust have been fulfilled, or have become illegal or impossible to fulfill, or compliance with the trust terms would defeat or substantially impair accomplishment of trust purposes. The court will consider the existence of a spendthrift provision when making their determination.

The trustee has the following powers after a trust has been terminated: (1) trustee can wind up trust affairs and distribute

proceeds to the beneficiaries; (2) Within a reasonable time; (3) reasonable time is a question of fact.

A QTIP trust defers federal estate tax. To qualify income must be payable to spouses for life. During the spouse's lifetime, no other beneficiaries are allowed. The trust corpus is taxed at the spouse's death.

For federal tax purposes the credit shelter is: (1) \$1,000,000 for lifetime gifts; and (2) \$1,500,000 for the estate including lifetime gifts.

The rights and obligations of a guardian of the person are: 91) Right to physical possession of the ward; (2) Duty of control and care; (3) Duty to provide clothing, food, and medical care as well as shelter; (4) Power to consent to medical treatment.

The rights and obligations of guardians of the estate include: (1) Right and duty to manage the ward's property; (2) right to enforce the ward's obligations; (3) Right to bring or defend suits on the ward's behalf.

A parent may by will or other written declaration appoint a guardian of the parent's minor children or incapacitated adult children. The named person must be appointed guardian unless the court finds them to be: (1) Disqualified; (2) dead; (3) refusal of service; (4) not in the ward's best interest; (5) Bond can be waived for the guardian of the person but not for a guardian of the estate.

The proper venue for the appointment of a guardian is the county where the parent's reside for minors or for adults, the county where the ward resides, or where her principal estate is located.

As to standing to commence a proceeding for the appointment of a guardian: Any person has standing to commence the proceeding. They can recover attorneys' fees from the ward's estate if the court finds that the proceeding was brought in good faith.

Those who are not eligible to be appointed as guardians include: (1) incapacitated people; (2) those with a conflict of interest; (3) Those whose inexperience or lack of education makes them incapable of prudently managing the ward's estate; (4) Person expressly disqualified in designation of guardian before need arises; (5) or, person convicted of sexual offenses, sexual assault, or injury to a child or the elderly.

A limited guardian ship is appropriate when the court finds that a person lacks capacity to do some, but not all of the tasks necessary to care for himself. The court may appoint a guardian with limited powers, and permit the individual to care for himself to the extent to which he is able.

The procedural safeguards which exist with respect to a guardian ship are: (1) An attorney ad litem represents the ward; (2) The guardian ad litem at the court's discretion; (3) Mandatory court investigator; (4) May appoint a court visitor; (5) Ward must be present at trial; (6) Ward or attorney ad litem may request a jury trial; (7) Clear and convincing evidence standard must be met for incapacity; (8) Guardianship papers are only valid for 16 months, and there should be a yearly review.

The guardians duties upon appointment are: (1) Guardian must qualify by taking an oath and posting a fiduciary bond within 20 days; (2) Must publish a notice of administration in a newspaper within 1 month; (3) must file an inventory of the estate within 30 days; (4) must file an application for monthly allowance within 30 days, to be expended from income and principal on the ward's behalf, stating separate amounts requested for: (a) education; and (b) maintenance; and (c) Maintenance of the ward's property; (5) A guardian has a duty to invest property not immediately needed so that an application to develop an investment plan or to modify or eliminate a duty to invest must be filed within 180 days.

A guardian may be removed without notice and a hearing: (1) If the guardian fails to post bond within 20 days; (2) Moves from Texas, or is absent from the state for more than three months, or cannot be served with notices; (3) Has cruelly treated the ward; (4) has failed to maintain or educate, or misapplied or embezzled assets; (5) Burden of proof is by clear and convincing evidence.

A guardian can be removed with notice and a hearing: (1) If there are grounds to believe that she has acted inappropriately; (2) If she is guilty of gross misconduct or mismanagement; (3) if she fails to comply with a court order or fails to file her annual report; or, (4) if she becomes incapacitated; or, (5) For some other reason is incapable of performing her duties.

The powers that the guardian has without court approval are the following: (1) The power to retain property with no duty to diversify for 1 year; (2) may make investment decisions that

are consistent with court approved plan; (3) may expend amounts in excess of the monthly allowance when prior court approval is impossible or inconvenient if there is clear and convincing evidence that they are reasonable and proper; (4) Can insure the property, pay taxes, etc...as necessary to maintain the property.

If a guardian is to sell real or personal property he must:
(1) obtain prior court approval and sell for the purpose of paying claims and expenses, ward's maintenance or to dispose of unproductive property.

A guardian of the person can get up to 5% of the ward's gross income, not including social security or veteran's benefits for compensation. On the other hand, a guardian of the estate is entitled to reasonable compensation and generally 5% is presumed reasonable.

another procedure available for handling money when a ward lacks capacity to do so: \$100,000 or less can be paid into the registry of the court to avoid guardianship, but the ward would have to go to the court for each disbursement. Also, if there is a guardian, a court created management trust under §867 of the probate code for a minor settlement. If more than \$50,000 is involved a bank must be the trustee. The trust continues up to age 25. If there is no guardian then an article 142 trust will accomplish the same result, but a bank must ALWAYS be the trustee.

A less expensive way of handling the guardianship of an adult ward's estate would be that a guardian of the person can be appointed guardian to receive funds from a government source, and can expend payments on the ward's behalf without a court order, if the amount of pension is less than \$12,000 a year.

An oral trust is valid for a gift of mixed personal and real property, such as in a family business in the following ways:
(1) for mixed trust, oral trust of personal property it must be simultaneous with written transfer of real property.

An appointed trustee must do the following to avoid appointment of an unwanted office: (1) the office of trustee cannot be compelled against a person's wishes; (2) the person must inform the grantor of the trust (or his estate, if deceased) and take no action with regards to the trust property that would indicate an acceptance of the office.

A trust is modifiable or revocable unless made otherwise in the construction of the trust. Modifications and revocations must be made in writing and must be signed by the grantor.

The transferring of title to "Joe Blow, trustee" does not create a trust with Joe Blow as beneficiary. Under Texas law, no trust arises if title is transferred to the trustee without explicit powers or duties. Thus if Joe possesses title, he holds the property in trust for the grantor or the grantor's estate.

A trust will fail for vagueness if no instrument specifies: (1) when; (2) how; and, (3) to whom the income is to be distributed; (4) whether the trustee has the power to distribute principal; (5) how long the trust is to last; or, (6) what powers are granted to the trustee.

However, at least one Texas Court of Appeals decision has held that a trust was valid if a testator had manifested intent to create a trust, the trust named beneficiaries, and the object of the trust is maintenance of a beneficiaries' welfare.

the requirements for a bank to have capacity to be a trustee are: (1) a bank can serve as a trustee if the bank's charter authorizes it to exercise trust powers; (2) if an appointed bank lacks capacity; (a) upon petition; (b) court may appoint a suitable trustee.

The organizations that can serve as beneficiaries of a charitable trust are: (1) Any charitable entity that is qualified as a charity under the IRS code; or, (2) Whose activities are determined to be charitable; (3) non-profit status is not enough; (4) The charity must comport to the charitable purpose of the trust.